IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 456 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

TARUN K.BHATT

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 456 of 2000

MR JJ YAGNIK for Petitioner No. 1

MR HH PATEL PUBLIC PROSECUTOR for Respondent No. 1

MR HORMAZ B SHETHNA for Respondent No. 2

..... for Respondent No. 3

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 10/10/2001

ORAL JUDGEMENT

#. Heard learned advocate Mr.J.J.Yagnik, for the petitioner, learned APP Mr.H.H.Patel, for the respondent

Nos.1 & 3 and learned advocate Mr.H.B.Shethna, for the respondent No.2.

#. This Revision Application is filed against an order passed by the learned Magistrate below Ex.15 in Search Warrant Application No.44/2000. As per the brief fact which is required to be noted is, Kashmira T.Bhatt - wife respondent No.2 herein applied before the Judicial Magistrate First Class, Surat for the Search Warrant of his child under Section 97 of the Criminal Procedure Code against the present petitioner - husband. Both the spouse appears to have separated and child remained in the custody of father - husband. There was some dispute about the serving of the notice to the present petitioner because at first instance learned Magistrate passed an order to issue notice to respondent No.2. However, assuming that the notice was served upon the present petitioner learned Magistrate issued warrant against the present petitioner - husband in the above mentioned application under Section -97 of the Code of Criminal Procedure. There upon the present petitioner - husband filed an application at Ex.15 in which it was prayed that, (1) the service of the application has not been properly served upon the husband which be properly served (2) the order passed by the learned Magistrate for issuance of warrant against the husband be stayed and concerned Inspector of Police be informed not to execute such warrant (3) any other order be passed which may be just and proper in the interest of child. On filing this application, after hearing both the parties learned Magistrate rejected the application Ex.15 filed by the husband on the ground that he had no powers to stay the order of execution of the warrant issued by the same Court and, hence, this Revision Application.

#. It appears from the record that this Hon'ble Court has passed some interim orders from time to time, at that time perhaps child was also brought to this Court. When this matter came up for final hearing on 9.10.2001 learned advocate for the petitioner was not present and order for the dismissing of the Revision Application was dictated, but the same was not signed and in the evening as learned advocate Mr.J.J.Yagnik assured the Court that he will appear with learned advocate for the other side on the next date i.e. today and, therefore, this order was not signed and the matter was heard on merits today.

#. Learned advocate Mr.J.J.Yagnik has made various contentions in this application, first of them and perhaps the prime contention is whether the learned Magistrate has power and jurisdiction to issue warrant

under Section 97 for the custody of the child. For this contention, learned advocate J.J.Yagnik relied upon the decision of Supreme Court in the case of Ramesh vs. Laxmibai (Smt.) reported in 1998 Supreme Court Cases (Cri) 999.

#. However, perusing the record and hearing the learned advocate for the applicant it clearly appears that at this stage the prime question would be whether this Revision Application would be maintainable. This Court in the matter of Mayabhai Raghavbhai Vs. Pancholi Dhula Amra, reported in GLR 1984 (2) 816, has clearly laid down that, "an order under Sec.97 of the Criminal Procedure Code has been held to be an interlocutory order. The Additional Sessions Judge had, therefore, obviously erred in entertaining the revision application before him." Meaning thereby that the order of learned Judicial Magistrate First Class refusing to stay the execution of the warrant would certainly be an interlocutory order against which the revision would not lie and, therefore, this Revision Application would not be maintainable because no final order under Section 97 has been passed by the learned Magistrate in pursuance of the process which he has issued. So, the contention that the Magistrate has committed jurisdictional error in view of the above said decision of the Supreme Court, has no relevance at this juncture because the Magistrate has still to exercise his jurisdiction and pass the final order and, therefore, this Revision Application on this law point would not be maintainable.

#. However, since the question is of the custody of a minor child aged about 4 years, the learned Magistrate is directed to deal with the matter with utmost circumspection and, therefore, the learned Magistrate is directed to hear petitioner herein - husband as to the contentions which are raised in this Revision Application including the contention regarding jurisdiction to issue Search Warrant for the custody of the child. Learned Magistrate after hearing the husband in respect of his all contentions and after hearing the learned advocate for the applicant - wife shall come to the proper conclusion. Till passing of the final order as said above learned Magistrate shall not insist the presence of the child in the Court. However, if the final order is passed by the Magistrate and is in respect of the handing over of the custody of the child to the applicant then the same order will be suspended for 10 days from the date of passing of such order so the petitioner herein may approach the higher forum. Learned Magistrate is

again directed to deal with the matter with utmost circumspection and pass necessary final order after hearing both the parties. Further, learned Magistrate shall decide Misc. Application No.44/2000 within 3 weeks from the date of receipt of the writ of this Court. Office is directed to transmit writ of this Court immediately to the learned Magistrate. This direction is necessary because the question pertains to the custody of a minor child from husband to wife. With this order, this Revision Application is dismissed. Rule is discharged.

(J. R. VORA, J.)

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